LAW360

Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Pondering What Tibble V. Edison May Mean For ERISA Plans

Law360, New York (March 05, 2015, 11:31 AM ET) --

Nancy G. Ross

On Feb. 24, the U.S. Supreme Court heard arguments in Tibble v. Edison International, a case involving claims that retirement plan administrators breached their fiduciary duties by selecting and offering allegedly imprudent investment options as part of a company-sponsored 401(k) plan. While a decision is not expected until later this year, the Supreme Court's scrutiny of the parties' respective arguments highlighted the difficult questions fiduciaries face on a daily basis.

Is There Even a Dispute?

The justices struggled to identify the contours of the parties' dispute. In granting certiorari, the Supreme Court took the unusual step of identifying the question it wanted the parties to address: Whether a claim that Employee Retirement Income Security Act plan fiduciaries breached their duty of prudence by offering higher-cost retail-class mutual funds to plan participants, even though identical lower-cost institution-class mutual funds were available, is barred by 29 U.S.C. Section 1113(1) when fiduciaries initially chose the higher-cost mutual funds as plan investments more than six years before the claim was filed. But, as the briefing made clear, insofar as ERISA fiduciaries have a duty to monitor plan investments, all parties agree that the answer to the court's question is no if the claim focuses on the duty to monitor. The parties nevertheless disagreed about the nature of petitioners' case, which led Justices Samuel Alito and Antonin Scalia to press the petitioners, government and respondents, each in turn, to identify the point of law over which there was disagreement.

The petitioners argued that the Ninth Circuit erred by affirming the district court's determination that the duty to remove allegedly improper investments arises only when there has been a significant change in circumstances. Such a requirement, they contended, amounts to an "added burden" that is not contemplated by ERISA's fiduciary rule. According to the petitioners, "it doesn't matter whether there have been significant or insignificant changes" because there is an ever-present and ongoing duty to monitor the investments.

The respondents agreed with the petitioners that there is an ongoing duty to monitor the investments regardless of when they are selected. They disagreed, however, with the petitioners' characterization of the lower courts' holdings. According to the respondents, the lower courts did not hold that the duty to monitor arises only when there are changed circumstances. Instead, according to the petitioners, the

Ninth Circuit simply noted that in order to state a claim for breach of the duty to monitor, there must generally be some sort of change that would cause a vigilant fiduciary to take note and change course.

The government took a third approach. In its view, the matter of critical importance was the Ninth Circuit's characterization of how circumstances must change before a claim can be brought for a monitoring failure. The government deemed the Ninth Circuit's standard too difficult because, as the government interpreted that court's approach, the changed circumstances test would warrant review only after a change akin to "a new fund being put in place."

As Justice Ruth Bader Ginsburg pointed out, the central problem appeared to be with the Ninth Circuit's changed circumstances language, which she said "seems to have confused everybody." The justices struggled, however, with how to resolve the apparent dispute over this phrase. Justice Ginsburg queried whether simply instructing the lower courts to strike the "changed circumstances" phrase from their vernacular might resolve the case. Such a narrow outcome would, of course, provide little guidance to fiduciaries facing similar circumstances in the future.

Will the Supreme Court Offer Any Guidance?

If the Supreme Court finds that the Ninth Circuit erred in holding that there must be "changed circumstances" in order to support a claim for breach of the duty to monitor, the question then becomes whether the court will describe what the duty to monitor entails. Some justices seemed skeptical that it was their place to address the details. Justice Sonia Sotomayor, for example, remarked that she was "not ready" to speak to the specific content of the duty to monitor. In her view, that issue should be one for the trier of fact. Justice Stephen Breyer expressed similar sentiments, noting that the contours of the duty would first need to be developed by the trial court before the Supreme Court can weigh in.

Justice Scalia, however, argued that there is a need for some sort of workable guidance in this area. "Life is too short," he quipped, to require "every federal district court not only to determine whether a particular purchase was sensible or not, but to say year by year whether [fiduciaries have] done a careful enough review." He argued that the "changed circumstances" standard at least "offers some help" when it comes to determining when a review is necessary, although he acknowledged that there might still be liability for a fiduciary that fails to recognize a problem that is "obvious." Justice Sotomayor agreed that there was "some force" to the argument that a quarterly "general market evaluation" seemed impractical.

Other justices also appeared willing to delve into the details, but would impose a more burdensome set of requirements on fiduciaries. Justice Elena Kagan, for example, seemed doubtful that monitoring exclusively for "significant changes in the value and risks of investment[s]" satisfied a fiduciary's duty of prudence. In her view, the duty to monitor should be more robust, including, for example, periodic reviews of the investment returns, funds' managers and fees. She also questioned the respondents multiple times as to how a prudent fiduciary could refuse to change to a lower cost fund if the two funds are otherwise identical.

Takeaways from Oral Arguments

Pending the Supreme Court's decision, the takeaway for plan sponsors and fiduciaries is that there has never been a more important time to revisit investment monitoring practices and procedures. Fiduciary committees should not just limit their regular review to comparing investment performance and fees to

appropriate benchmarks. Rather, to minimize the risk of potential litigation, fiduciary committees should expand their analyses to make sure that each investment continues to meet the objectives of the plan's investment policy statement, that it makes sense when viewed as part of the plan's entire portfolio and that it remains an appropriate choice among others in its asset class. The latter evaluations need not be done as frequently as performance and fees monitoring, but should be part of an annual review. Such a review might also include appropriate independent advisors. These steps, memorialized properly, will go a long way in deterring plaintiffs' lawyers from preying on your plan.

—By Nancy G. Ross, Brian D. Netter and Reginald R. Goeke, Mayer Brown LLP

Nancy Ross is a partner in Mayer Brown's Chicago office, where she is a member of the firm's employment and benefits group.

Brian Netter and Reginald Goeke are partners in Mayer Brown's Washington, D.C., office. Netter is a member of the firm's Supreme Court and appellate practice group.

Samuel Myler contributed to this article.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2015, Portfolio Media, Inc.